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IN THE

Supreme Court of the United States

October Term, 1953

No. 133

C. MAXWELL BROWN, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. _____.

C. MAXWELL BROWN, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

C. Maxwell Brown prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on December 8, 1953.

OPINIONS BELOW.

The District Court wrote no opinion. The order of the Circuit Court of Appeals (no opinion) appears in 209 F. 2d 260.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 8, 1953. The order of the Circuit Court of Appeals denying the petition for a rehearing was entered April 20, 1954. An order staying the mandate of the Court of Appeals thirty days was entered April 30, 1954.

The jurisdiction of this Court is invoked under U. S. C., Title 28, Section 1254(1).

QUESTIONS PRESENTED.

1. In a prosecution for alleged income tax evasion, was the admission of testimony of Internal Revenue Service Agent Venable based on information furnished him by the petitioner in the absence of a waiver, a violation of the Fifth Amendment of the United States Constitution, that no person shall be compelled in any criminal proceedings to be a witness against himself? If it was a violation, did the petitioner waive his constitutional right by furnishing the information to the agent under a threat by the agent to compel it by official process and by the agent's representing to the petitioner that the information was for civil purposes, when in fact he then intended to use it for criminal prosecution?

2. Was the trial Court's interpretation of the law to the jury in an income tax evasion case under Title 26, Section 145 (b), based on increases in net worth preju-

dicial error when the Court instructed the jury that if the petitioner willfully filed a false return he is guilty of violating the statute, U. S. C., Title 26, Section 145 (b) as specified in the indictment?

3. Was the petitioner convicted of violating U. S. C., Title 26, Section 145 (a) and (c) in light of the Court's instructions to the jury without an indictment other than a violation of Title 26, Section 145 (b)?

CONSTITUTION INVOLVED.

Amendments to the Constitution, Art. IV, reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendments to the Constitution, Art. V, reads:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED.

U. S. C. Section 145 reads as follows:

"(a) Failure to File Returns, Submit Information, or Pay Tax.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return, or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return, or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

"(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

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"(c) Any individual who willfully makes and subscribed a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code." (Added 1942 Act and Repealed 8-27-1949.)

U. S. C. Section 3614 reads:

"(a) To Determine Liability of the Taxpayer. —The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

U. S. C. Section 3615 reads:

"(a) General Authority.—It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The

collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

"(d) Service.—Such summons shall in all cases be served by a deputy collector of the district where the person to whom it is directed may be found, by an attested copy delivered to such person in hand, or left at his last and usual place of abode, allowing such person one day for each twenty-five miles he may be required to travel, computed from the place of service to the place of examination; and the certificate of service signed by such deputy shall be evidence of the facts it states on the hearing of an application, for an attachment. When the summons requires the production of books, it shall be sufficient if such books are described with reasonable certainty.

"(e) Enforcement.—Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collecter may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made,

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to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

U. S. C. Section 3616 reads:

"Whenever any person—

"(a) False Returns.—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or,

"(b) Neglect to Obey Summons.—Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to produce said books—he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

U. S. C. Section 3633 reads:

"(a) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

STATEMENT.

Petitioner is a lawyer in Louisville, Kenutcky. He was indicted on March 2, 1953, by a federal grand jury for violation of U. S. C., Title 26, Section 145(b) (R. 4a). The indictment was in two counts. It was alleged in the first count that he willfully and knowingly attempted to defeat and evade income tax which he owed for the calendar year 1946 by filing a false and fraudulent return, wherein he reported his net income as $6,244.51, and tax as $858.40, whereas, he well knew his net income from salary and legal fees was $16,251.93 and his tax was $4,159.48. The allegations in the second count for the calendar year 1947 are the same as in the first except that the net income reported was the sum of $3,037.09 and the tax was $197.05, whereas, his net income from legal fees was $14,444.96 and tax was $3,411.76 (R. 4a, 5a).

Seven days after he was indicted, petitioner made a motion before the trial Court to suppress all evidence of checks, letters, pleadings, memorandums, names and addresses of clients, statements and schedules identified as being a part of the records of the defendant, and obtained from him in his private office in the Louisville Trust Building, Louisville, Kentucky, by Mr. Edward Brumleve and Levoy Venable, agents of the Bureau of Internal Revenue of the United States (R. 8a). The trial Court heard evidence on the motions on March 10, 1953. Petitioner testified that agent Brumleve came to his office at 9:15 o'clock on January 3, 1950, and introduced himself as an agent

of the Bureau of Internal Revenue and stated that he wanted to make a routine check, and the first thing he wanted to examine was the safe-deposit box and to check records and files. Petitioner objected that he had no right to examine the box. Brumleve insisted that he did have such a right in making a routine check, and he became excited and his face became red. He said, "Now, it is either a question of you letting me look in the box or you face Judge Shelbourne by Court order." Petitioner then let him inspect the box, and he returned the next morning and was followed within a few minutes by Mr. Venable. Petitioner again objected to his looking at his records and Mr. Brumleve repeated that he would compel petitioner to give up the records by Court order (R. 34a, 35a, 36a). Petitioner believed him and let him see the records (R. 41a, 42a). Agent Brumleve admitted that he told petitioner he was making a routine check (R. 27a) and he examined the safe-deposit box on his first visit. In answer to the question whether the petitioner objected to his examination, Mr. Brumleve said, "I don't know what you would call objection, I don't think he did" (R. 28a). He asked me, "Why are you checking me?" I said, "Well, it is a routine check" (R. 32a).

Agent Venable testified:

"Q. Tell the jury what is the nature of your work, is that to discover fraud?

A. It is not necessarily discovering fraud. The agents usually discover fraud before we go

in. Our job is to develop fraud cases for prosecution.

Q. Did Mr. Brumleve call you in on this case?

A. Yes.

Q. When did he call you in?

A. On this day, on the 4th.

Q. That meant he had discovered fraud?

A. That meant he thought he had discovered fraud, yes."

Petitioner made available to agents Brumleve and Venable all of his records, including his private files, cancelled checks and bank statements (R. 160a). He surrendered this evidence under threat of Court order to compel it (R. 40a, 41a).

The trial Court, without giving any reason, declined to suppress the evidence thus obtained (R. 9a, 10a) and again after agent Venable admitted that Brumleve called him into the case to verify fraud for criminal prosecution, petitioner sought to lay a foundation to exclude the testimony of Mr. Venable by testifying at his trial how the evidence was obtained by deceit and threat, but the trial Court declined to permit him to so testify (R. 159a, 218a). Agent Brumleve did not testify at the trial. Agent Venable further testified that he examined petitioner's cancelled checks, bank statements and a list of fees (R. 106a).

At the conclusion of the Government's case, defendant moved the Court for a directed verdict of acquittal (R. 155a).

Petitioner in his motion for a new trial, paragraph 13a (R. 14a, 15a), again raised the same point

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that the evidence of Venable was obtained from the petitioner by coercion contrary to the Constitution of the United States (R. 15a). He urged the same point before the United States Court of Appeals (R. 22a-31a).

Petitioner was appointed Assistant County Attorney for Jefferson County in July, 1940, and served in that capacity until January 6, 1946. During the same period and thereafter he engaged in some private practice of law (R. 157a).

The sources of his income were wages from his employment and fees from his law practice. He reported all of his income in the calendar year in which it was received except in certain cases of private practice he had a contingent fee agreement with the client to refund any fee received in event, due to official duties, he was unable to conclude the entire case and in these cases he reported the fees in the year in which the case was completed. In the year 1946 such fees were received in the sum of $7,300.00 and reported in 1949 when the cases were completed. In 1947 such fees were received in the sum of $5,700.00 and reported in 1948 and 1949 when the cases were completed (R. 163a, 164a, 172a). He was advised by counsel on how to report contingent fees (R. 165a). A main point in this case revolved around whether the contingent fees were reportable for tax in the year when received or in the year when the contingency occurred. The Government rested its case on proof of taxable income by a statement of increases in net worth (R. 18a 107a).

Petitioner claimed that the net worth statement was in error in including the contingent fees, and also in excessive living expenses and in omitting beginning assets. The trial Court permitted the Government to produce in evidence as Exhibit 27 (R. 18a) a statement of net worth for each year beginning with 1942 and ending with 1948 over the objection of the petitioner although only the years 1946 and 1947 were involved (R. 118a).

Petitioner offered Instruction No. X to conform with each count of the indictment as follows:

> "You are instructed that the defendant is not charged in this indictment with an intentional and wilful failure to make a return and pay a tax, but he is charged with a much more serious offense of attempting to evade and defeat a large part of his income taxes by false and fraudulent statements contained in his income tax returns for the years in question.
>
> "A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false and made with the intent and purpose to deceive and mislead some person.
>
> "So that one of the material allegations in each one of the counts on the indictment is that the defendant attempted to defeat and evade a large part of the income tax due from him, substantially as charged in that Count by filing or causing to be filed with the Collector of Internal Revenue a fraudulent income tax return containing the statement substantially as set out in that Count of the indictment, and that such statements when made

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> were false and known by the defendant to be false, and were made with the intent on the part of the defendant to conceal from the said Collector of Internal Revenue defendant's true and correct gross and net income received by him during the calendar years substantially as set out in such Count of the indictment; and in this manner attempted to defeat and evade that part of the tax which was not reported by him in his income tax return for the year in question" (R. 49a).

The Court did not give the instruction offered by petitioner.

Petitioner objected to the Court's instruction when it was given to the jury (R. 228a) and again in his motion for a new trial (Item 11, R. 14a) and on appeal to the United States Court of Appeals (R. 3a).

Petitioner reported contingent fees following advice of tax counsel and paid the tax on the fees in the year in which the contingency terminated (R. 164a-165a). *Allen* v. *Com.*, 5 T. C. 1232.

The Court instructed the jury on this issue as follows:

> "* * * This is a criminal case, and the fact that the defendant has or may have or may have not paid or settled the civil liability for the taxes involved in these years is not in and of itself evidence of a defense—it is not a defense in and of itself to the charges embodied in this indictment * * * (R. 224a).

REASONS FOR GRANTING WRIT.

Petitioner urges that his petition for certiorari should be granted because issues are involved which are important in the administration of the Internal Revenue laws and important in their effect on those accused of income tax evasion. The decisions below are in conflict with decisions of Courts of Appeals in other circuits.

1. The decisions below were adverse to the petitioner on the issue of whether or not in prosecution for alleged income tax evasion, admission of the testimony of an internal revenue agent, Venable, based on information furnished him by the petitioner in the absence of a waiver, was a violation of the Fifth Amendment of the United States Constitution in that no person shall be compelled in any criminal proceedings to be a witness against himself. And if it was a violation, did the petitioner waive his constitutional right of immunity by furnishing the information to the agent under a threat by the agent to compel the information by official process and by the agent representing to the petitioner that the information was for civil purposes, when in fact he was then intending for criminal prosecution?

These specific issues have never been decided by this Court.

The decisions below in the instant case are in conflict in principle with the decisions of this Court in the case of *Boyd* v. *U. S.*, 116 U. S. 616, and also in the

case of *Go-Bart Importing Company* v. *U. S.*, 282 U. S. 344.

The decisions below in the instant case were adverse to the petitioner without an opinion. The result is in conflict in principle with the Eighth Circuit in the case of *Hanson* v. *U. S.*, 186 F. 2d 61.

The decisions below in the instant case are in conflict in principle with the Tenth Circuit in the case (non-tax) of *Bowles, etc.* v. *The Beatrice Creamery Company*, 146 F. 2d 744.

The decisions below in the instant case are in accord in principle with the Third Circuit in the case of *Nicola* v. *U. S.*, 72 F. 2d 780.

The decisions below in the instant case are in conflict in principle with the Court of Appeals of the District of Columbia in the case (non-tax) of *Nelson* v. *U. S.*, 208 F. 2d 505.

The decisions below in the instant case are in accord in principle with the Fifth Circuit in the case of *Montgomery* v. *U. S.*, 203 F. 2d 887.

2. Was the trial Court's interpretation of the law to the jury in an income tax evasion case under U. S. C., Title 26, Section 145 (b), based on increases in net worth prejudicial error when the Court instructed the jury that if the petitioner willfully filed a false return he is guilty of violating the statute meaning Title 26, Section 145 (b), as specified in the indictment?

Petitioner objected to this instruction when it was given. It presented to the jury a single issue on which to determine guilt and it diverted the jury from con-

sideration of other equally important issues of whether the petitioner had knowledge that the return was false, whether he had intent to evade tax, whether a tax was in fact due and whether the Government's evidence, based upon a statement of increases in net worth was erroneous in omitting beginning assets, in omitting a return of capital from sale of furniture and in exaggerated living expenses.

The decisions below in the instant case are in conflict in principle with the decision of this Court in the case of *Spies* v. *U. S.*, 317 U .S. 492.

The decisions below in the instant case are in conflict in principle with the Third Circuit in the case of *Caserta* v. *U. S.*, 199 F. 2d 905, and in the Fifth Circuit in the case of *J. Demetree* v. *U. S.*, 207 F. 2d 892.

Petitioner's objection to this instruction is that it limited the offense to a misdemeanor without giving a correct instruction to the jury concerning the consideration which should be given to the Government's net worth statement.

The instruction which the Court gave on this point follows:

> "The Government has introduced in evidence here testimony of defendant's net worth or the increase in net worth or estate, beginning with what is called a basic date—that is, December 31st, 1945, which establishes the worth as of the first day of the calendar year 1946. Then if the testimony will properly show all of his assets and all of his property at the end of that year, then the

difference in those two amounts will reflect the income" (p. 223a).

This instruction is erroneous in that it failed to take into account liabilities, namely, $15,000.00 which the petitioner borrowed from the Citizens Fidelity Bank. It failed to take into account a correct net worth starting point. It assumed the beginning net worth as an established fact.

The decisions below in the instant case are in conflict with the Fifth Circuit in the case of *Bryan* v. *U. S.*, 175 F. 2d 223, in that the net worth statement was not definitely established and the instruction concerning it was in error. The case of *U. S.* v. *Fenwick*, 177 F. 2d 488, in the Seventh Circuit, and also, the case of *U. S.* v. *Calderon*, 207 F. 2d 277, in the Ninth Circuit are to the same effect.

The decisions below in the instant case are in accord with the Tenth Circuit in the case of *Holland, et al.* v. *U. S.*, 209 F. 2d 516.

The decisions below in the instant case are in conflict in principle with the Ninth Circuit in the case of *Remmer* v. *U. S.*, 205 F. 2d 277.

The decisions below in the instant case are in conflict with the Third Circuit in the case of *Morris* v. *U. S.*, 156 F. 2d 525, and *U. S.* v. *Pincourt*, 159 F. 2d 917, in that it is the duty of the trial Court to correctly instruct the jury with respect to the statute governing the offense as well as the facts set forth in the indictment.

Petitioner urges that the instruction given here was prejudicial error and as stated by the Court in *Spies* v. *U. S., supra,* he

> "* * * is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference the defendant should be acquitted."

3. Was the petitioner convicted of violating U. S. C., Title 26, Section 145 (a) and (c) in the light of the Court's instructions to the jury without an indictment other than for violation of Title 26, Section 145 (b)?

The trial Court instructed the jury as follows:

> "In this case the positive acts are said by the Government to be the filing of a false return in each of the years. I charge you that if the acts were wilfully done, they are sufficient to constitute the violation of the statute here involved" (p. 225a).

This instruction covers Title 26, Section 145 (c), which was added by the 1942 Act and was in effect during the years involved, 1946 and 1947, but repealed 8-27-1949. The Court further instructed the jury as follows:

> "If you should find, however, that the defendant knowingly and wilfully failed to keep proper records or to honestly report his income and should

find beyond a reasonable doubt such failure was for the purpose of having the returns show a lesser tax than was really due, then your verdict should be guilty if consistent with the other principles which I have given under the law" (p. 227a).

This instruction covers Title 26, Section 145 (a). It directs the jury to infer intent to evade tax from evidence of a violation of Section 145 (a).

The decisions below in the instant case are in conflict with *U. S.* v. *Spies, supra.*

The decisions below in the instant case are in conflict in principle with the Third Circuit in the cases of *U. S.* v. *Levy,* 153 F. 2d 995, and *U. S.* v. *Noble,* 155 F. 2d 315, in that the Court is required to instruct the jury with respect to the statute governing the opinions set forth in the indictment.

The issues raised here are common in the administration of the Internal Revenue Statutes and they are of vital importance to both the Government and the taxpayers involved. On account of the conflict and variations and views expressed by the trial Courts and by the Appellate Courts, it is urged that in the public interest these issues should be resolved by a decision of this Court.

ARGUMENT.

1. The admission of the testimony of Internal Revenue Agent Venable was a violation of the petitioner's right of immunity under the Fifth Amendment of the United States Constitution unless this issues comes within the principle of required records as applied in the case of Shapiro v. U. S., 335 U. S. 1.

We urge that this case does not come within that principle.

If it was a violation, did the petitioner waive his constitutional right by furnishing the information to the agent under a threat by the agent to compel it by official process and by the agent's representing to the petitioner that the information was for civil purposes when, in fact, he then intended to use it for criminal prosecution?

On January 3, 1950, the day revenue agent Brumleve first visited with the petitioner, the revenue agent knew that he was initiating a criminal case. He called special agent Venable to join him in the case and the following morning, January 4, 1950, the two of them went to the petitioner's office for an interview (R. 132a).

In answer to the question whether the petitioner objected to giving information to the agent, Mr. Brumleve said: "I don't know what you would call objection, I don't think he did" (R. 28a). He ask me "why are you checking me? I said, Well it is a routine check" (R. 32a). He gave this testimony on the preliminary motion to suppress evidence, but

noticeably he did not testify at the trial, although he was at the trial (R. 132a).

Special agent Venable admitted on cross-examination that he was called in the case because agent Brumleve thought he had discovered fraud on January 3d, and Mr. Venable joined him in the case on the morning of January 4th, to develop a fraud case for prosecution (R. 127a).

These facts disclose misrepresentation to the petitioner and show deceit to obtain information from him. A waiver is based upon consent and petitioner was led to believe that the agents were not seeking criminal prosecution but that they were making a "routine check" of a civil liability as they were permitted to do under U. S. C., Title 26, Section 3614. They threatened Court action to compel him to give the information for that purpose.

The conduct of the revenue agents in this case discloses a pattern of approach to taxpayers in the administration of revenue laws. In the case of *U. S.* v. *Montgomery, supra,* the agent explained to the taxpayer that he desired to make a "routine check". In the case of *U. S.* v. *Lipshitz,* 117 F. Supp. 466, the agent explained to the taxpayer that he was making a "routine examination" of a partnership return when in fact he intended criminal prosecution. In the case of *U. S.* v. *Wolrich,* 119 F. Supp. 538, the revenue agent explained to the taxpayer that he was making the "usual routine audit" and introduced the special agent as a "fellow revenue agent".

The 1950 report of the American Bar Association's Committee on procedure in fraud cases states:

> "The bureau officials seem to feel * * * that a practice of advising taxpayers of their constitutional rights at the beginning of a special agent investigation would unduly alarm a large proportion of those investigated whose cases are dropped after a routine check."

Alarm created by advising taxpayers of their constitutional rights at the beginning of a fraud investigation is one thing and the alarm resulting from a loss of constitutional rights by being misled at the beginning of a fraud investigation is altogether another thing.

The trial Court in the case of *U. S.* v. *Guerrina,* 112 F. Supp. 126, Third Circuit, recognized this alarming situation and treated the issue as one of first impression and declined to follow in principle the case of *Nicola* v. *U. S., supra,* in the same circuit and expressly followed the principle declared in the Eighth Circuit in the case of *Hanson* v. *U. S., supra.* This decision is in accord in principle with the decision of this Court in the case of *Gouled* v. *U. S.,* 255 U. S. 298. In the Seventh Circuit, in the case of *U. S.* v. *Manno,* 118 F. Supp. 511, the defendants contend that Government agents by stealth and misrepresentation obtained permission to examine books; that they were to be examined for civil liability and not with a view to criminal prosecution. The Government contended that the books were made available voluntarily to the

agents. The District Court expressed the same principles declared in the case of *U. S.* v. *Guerrina, supra,* but it decided the issue in favor of the Government upon a finding of fact unlike the instant case that criminal prosecution was not contemplated when the revenue agents interviewed the defendant and also found that when evidence of criminal fraud was uncovered the agents warned the defendants that the matter would be referred to the intelligence division.

In *Nicola* v. *U. S., supra,* it was held that the defendant must claim and stand on his right of immunity before the revenue agent and refuse to produce his books or evidence. The defendant is placed in peril of being in violation of Title 26, Section 145 (a), or waiving any right which he may have under the Constitution.

Consent to giving information waives the constitutional immunity, but it was held in principle in *Go-Bart Importing Co.* v. *U. S., supra,* and in the Fifth Circuit in the case of *Ray* v. *U. S.,* 84 F. 2d 654, that such consent must not be induced by misrepresentation, fraud, trickery, promises or threats.

Petitioner believed that the agents had authority under U. S. C., Title 26, Section 3615, to compel him to give information for civil purposes and subject him to punishment for willful failure to do so. He would have no defense to such action if the agents were in fact seeking information only for civil purposes.

Acquiescence reasonably attributable to a regard for authority of the law is not a waiver. *Amos* v. *U. S.,* 255 U. S. 313 (non-tax case).

Petitioner raised this issue before the trial Court on motion to suppress evidence and to dismiss the indictment, on motion for a directed judgment of acquittal, on motion for a new trial and also before the Court of Appeals. He stands in the same position of innumerable persons who are under examination in the administration of the internal revenue laws and whose constitutional rights are denied in the zeal of the examining agents to acquire, in a wrongful way, vital evidence on which to base an inference or proof of tax evasion. This issue is in need of clarification and decision by this Court.

2. Was the trial Court's interpretation of the law to the jury in an income tax evasion case under Title 26, Section 145 (b) based on increases in net worth prejudicial error when the Court instructed the jury that if the petitioner willfully filed a false return he is guilty of violating the statute, U. S. C., Title 26, Section 145 (b) as specified in the indictment?

The trial Court oversimplified the Government's case by instructing the jury that if the petitioner filed a false return he is guilty of violating the statute. Coupled with this instruction the Court erroneously instructed the jury further:

> "The Government has introduced in evidence here testimony of the defendant's net worth or the increase in his net worth or estate, beginning with what is called a basic date—that is, December 31st, 1945, which establishes the worth as of the first day of the calendar year 1946. Then if the testi-

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mony will properly show all of his assets and all of his property at the end of that year, then the difference in those two amounts will reflect the income" (R. 223a).

The Government based its case against the petitioner on proof of increases in net worth (R. 18a).

The years involved were the calendar years 1946 and 1947. The net worth exhibit covered the calendar years 1942 through 1948, inclusive (R. 18a). This involved a defense as to five years not specified in the indictment over petitioner's objection. The Government undertook to support the statement of increases in net worth by testimony of special agent Venable who accepted as true those extra-judicial statements which he claimed that the petitioner made to him and were favorable to the Government's net worth statement, and Mr. Venable rejected those extra-judicial statements which he claimed the petitioner made to him and were unfavorable to the Government's net worth statement. Specifically he asked the taxpayer about his cash on hand in 1945 and was told that it amounted to about $10,000.00. In the net worth statement Mr. Venable rejected cash on hand at any time (R. 128a, Exh. 18a). All checks payable to cash were treated as living expenses in the net worth statement and the petitioner's statement that many of such checks were for business expenses was wholly disregarded. The petitioner's statement to Mr. Venable concerning assets on hand at the beginning of the period which belonged to his wife, consisting of cash

and furniture which was sold during the years involved, were wholly disregarded in the net worth statement.

This method of proof on the part of the Government in its attempt to support the net worth statement was not only insufficient to sustain the burden of proof as to the issues in the case but it had the effect of shifting the burden of proof to the petitioner so that he was compelled to endeavor to carry the burden of disproving the conclusions made by the special agent Venable and incorporated in the net worth statement. Petitioner objected to this proof and moved to exclude it (R. 113a). At the conclusion of the Government's case the petitioner again moved for a judgment of acquittal (R. 155a). In his motion for a new trial, petitioner urged the same point (R. 15a). The same point was argued before the Court of Appeals.

The decisions below on this issue are in conflict with the principles recited in the opinion by the Court of Appeals for the Third Circuit in the case of *U. S.* v. *Caserta, supra,* and the Court said:

> "The cases show, however, a rather surprising rule that when the discrepancy between increased net worth and reported income is shown, the burden of explanation shifts to the taxpayer, at the same time repeating the usual criminal law rule that the burden throughout a criminal case is upon the prosecution."

The Court of Appeals for the Fifth Circuit in the case of *U. S.* v. *Demetree, supra,* expressed a similar

opinion in equally strong language as in *U. S.* v. *Caserta, supra.*

In the Tenth Circuit the Court of Appeals in the case of *Holland, et al.* v. *U. S., supra,* had before it a net worth case of income tax evasions wherein the evidence disclosed the beginning net worth uncertain and yet in that case as in the instant case the judgment of conviction was sustained. This result is in direct conflict with the principles declared in the cases of *U. S.* v. *Caserta, supra,* and *U. S.* v. *Demetree, supra.*

The trial Court's refusal to enter a judgment of acquittal at the conclusion of the Government's case enabled the Government to elect what findings it would accept and what findings it would reject and advance only those favorable to the Government to sustain its burden of proof in the case. This issue was involved in the Fifth Circuit in the case of *Bryan* v. *U. S., supra,* and also in the Seventh Circuit in the case of *U. S.* v. *Fenwick, supra,* and also in the Ninth Circuit in the case of *U. S.* v. *Calderon, supra.*

The trial Court failed to instruct the jury clearly on the essential elements of the crime defined in the statute. The Court's instruction was too narrow and inaccurate.

Petitioner received fees subject to contingencies and reported them and paid the tax on them upon the termination of the contingency and he did this according to a consistent manner and in accordance with legal advice. His action was based upon the law of the case

of *Allen* v. *Comm.*, 5 T. C. 1232. If he were correct in so reporting his income which was not taken into account in his favor in the Government's proof a good defense would result in the fact that he owed no tax. The trial Court charged the jury that his evidence on this issue was not a defense but that it was admitted in evidence on the issue of intent. This necessarily gave the jury the impression that intent to evade tax was not an element of defense and the Court overemphasized this impression by its instruction that if the petitioner willfully filed a false return he was guilty as charged.

The decisions below in the instant case are in conflict in principle on this issue in the Third Circuit in the case of *U. S.* v. *Levy*, 152 F. 2d 995, and also in the same Circuit in the case of *U. S.* v. *Pincourt*, 159 F. 2d 917.

3. Was the petitioner convicted of violating U. S. C., Title 26, Section 145 (a) and (c) in light of the Court's instructions to the jury without an indictment other than for a violation of Title 26, Section 145 (b)?

The precise issue here is whether or not an instruction which covers Section 145 (a), coupled with an instruction which covers Section 145 (c), is sufficient under an indictment which charges a violation of 145 (b).

In *Spies* v. *U. S.*, *supra*, this Court had before it the question, whether proof and a charge of multiple violation of Section 145 (a) was sufficient under an

indictment which charged a violation of Section 145 (b). There is a difference in the two issues. It is evident that the trial Court was endeavoring to follow the principles of laws announced in *Spies* v. *U. S.*, *supra,* by the numerous use of almost identical phrases in the instructions. It is believed that the Court drifted into error which was prejudicial to the petitioner.

Other important issues appear in the case and were urged before the trial Court and before the Court of Appeals.

A juror during the process of the trial disobeyed the admonition of the Court and procured evidence on his own initiative which was used to influence other jurors to convict. This was established by an affidavit of another juror, and contradicted by the one accused. Relief on this was denied by the trial Court and by the Court of Appeals.

The decisions below in the instant case are in conflict in principal with the Eighth Circuit in the case of *Wheaton* v. *U. S.,* 133 F. 2d 522.

The decisions below in the instant case are probably in conflict with the decision of this Court in the case of *Mattox* v. *U. S.,* 146 U. S. 140.

The decisions below in the instant case are probably in conflict with the decision of this Court in the case of *Clark* v. *U. S.,* 289 U. S. 1.

The decisions below in the instant case are in conflict in principle with the Ninth Circuit in the case of *Remmer* v. *U. S.,* 205 F. 2d 277.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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